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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HARRY DONALDSON, Defendant and Appellant.	E063500 (Super.Ct.No. FVA1300873) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash, Judge. Affirmed.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric Swenson and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant and appellant, Harry Donaldson, guilty as charged of the first degree, premeditated murder of Norris Ragland on April 30, 2007 (Pen. Code, §§ 187, subd. (a), 189)[1] and of personally and intentionally discharging a firearm causing great bodily injury or death in the murder of Ragland (§ 12022.53, subd. (d)). Defendant was sentenced to 50 years to life: 25 years to life for the murder plus 25 years to life for the firearm enhancement. A codefendant, Norman Sullivan, was tried for the murder before the same jury, but the court granted Sullivan's motion for acquittal following the prosecution's case-in-chief. (§ 1118.1.)

Defendant raises four claims of error: (1) his first degree murder conviction must be reduced to second degree murder because insufficient evidence shows the murder was premediated; (2) the court erroneously failed to instruct sua sponte on voluntary manslaughter based on unreasonable or imperfect self-defense; (3) the court abused its discretion in denying his motion for new trial based on newly discovered evidence, and in refusing to hear testimony from several witnesses, including Sullivan, who came forward after trial claiming defendant was not present at the time of the shooting and was not the shooter; and (4) defense counsel rendered ineffective assistance of counsel in failing to object to several of the prosecutor's rebuttal closing argument remarks.

We reject these claims and affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

II

BACKGROUND

A. Prosecution Evidence

Ragland was fatally shot on the evening of April 30, 2007. The murder charge against defendant was filed on May 20, 2013, six years later. Ragland's cousin, Brian Venerable, was the prosecution's principle witness and the only witness to the shooting who testified at trial.

1. Venerable's Trial Testimony

On the afternoon of April, 30, 2007, Venerable's "god-brother" "Alan" dropped off Venerable and Ragland at the liquor store near "the Jacksons" in Rialto. The Jacksons is an area where locals "hang out," and includes the liquor store and alleyway behind an apartment building and the liquor store. Around 3:00 or 4:00 p.m. that day, Venerable and Ragland went to the liquor store and bought a bottle of Hennessey. Then they walked to the alleyway where they ran into defendant and Sullivan, who appeared to be on their way to the liquor store.

Venerable testified that, earlier that day, Ragland told Venerable that defendant owed money to Venerable's sister, Charlene Hawkins. Defendant had refused to repay the debt and Ragland wanted to talk to defendant about the debt. Venerable was friends with defendant and Sullivan, and Venerable and Ragland had known defendant and Sullivan for years.

Venerable tried to talk to defendant about the debt, but defendant did not want to talk to Venerable. Defendant only wanted to talk to Ragland. Defendant and Ragland began walking together in the alleyway, some distance ahead of Venerable and Sullivan, who walked behind. Venerable could not hear what defendant and Ragland were saying, and there were "a lot of" other people in the alleyway. Venerable initially testified that he and Sullivan "[weren't] really talking" as they walked behind defendant and Ragland, but then Venerable admitted it was "possib[le]" that he and Sullivan talked about the debt and he told Sullivan "all of this could be over" if Sullivan and defendant would pay the debt.

The next thing Venerable knew, he heard defendant and Ragland "tussling"—they were either "wrestling" or throwing punches at each other. Venerable did not "really see" defendant and Ragland fighting, nor did he hear them arguing or yelling. As soon as Venerable heard the tussling, Sullivan hit Venerable in the eye, causing Venerable to stumble, but not fall down. Venerable "blanked out" and was "dazed" from being hit by Sullivan.

When Sullivan punched Venerable, defendant and Ragland were around 39 feet ahead of Venerable and Sullivan. While still "dazed" from being hit by Sullivan, Venerable heard gunshots. Sullivan had Venerable "in a headlock," but Venerable did not recall whether that was before or after he heard the gunshots. Some of the other people in the alleyway were in the 39-foot distance between Venerable and Sullivan, at one end, and defendant and Ragland, at the other, and some were "far away." Venerable

did not see who shot Ragland; he did not see defendant with a gun, and he did not see how far defendant was from Ragland when Ragland was shot. According to Venerable, Sullivan was right beside defendant when the shots were fired. Venerable denied he shot Ragland.

After he saw Ragland "kneel down," Venerable ran to Ragland and laid him down. Ragland said, "I've been shot," but did not say who shot him. Venerable testified that he did not have a chance to open the bottle of Hennessey, but he and Ragland smoked marijuana around 10:00 a.m. that morning.

Venerable did not talk to the police right after the shooting, but he spoke to City of Rialto homicide Detective Carl Jones three days later. He only spoke to the detective because he heard a warrant would be issued for his arrest if he did not go to the police; otherwise, he would not have come forward. Venerable testified his recollection was "probably better" at trial in 2014 than it was when he spoke to Detective Jones in early May 2007, and what he told Detective Jones "may or may not have been the complete truth."

The jury heard that Venerable had three felony convictions: a 2010 conviction for an unspecified felony and two 2004 convictions, one for possessing a controlled substance for sale and another for possessing marijuana for sale. Venerable was released from prison around two months before the shooting and was on parole at the time of the shooting.

2. Venerable's May 3, 2007 Interview

Detective Jones interviewed Venerable on May 3, 2007, and a portion of a DVD of the interview was played for the jury. There were several inconsistencies between Venerable's trial testimony in 2014 and his statements to Detective Jones in 2007. We highlight those inconsistencies here.

In contrast to his trial testimony that he and Ragland were dropped off at the Jacksons *together* on April 30, 2007, Venerable told the detective he went to the Jacksons by himself *to look for Ragland* after Ragland called him and said he was going there to look for defendant and to collect the debt defendant owed Hawkins. When Venerable arrived at the liquor store near the Jacksons, he saw Ragland nearby and tried to convince Ragland to leave with him. They did not leave the area. Instead, they walked into the alleyway where they ran into defendant and Sullivan. It appeared to Venerable that defendant and Sullivan were "already angry" at Venerable and Ragland. (In his trial testimony, Venerable did not mention that defendant or Sullivan appeared angry.)

While walking ahead of Venerable and Sullivan, defendant and Ragland began discussing the debt. As Venerable and Sullivan were walking behind Ragland and defendant, Venerable told Sullivan, "all you gotta do is pay Charlene the money . . . all that can be over with. Cuz we been knowing each other too many years . . . ." When defendant and Ragland were "not too far" ahead of him, Venerable heard Ragland say to defendant, "so how much you got right now?" (In his trial testimony, Venerable initially denied discussing the debt with Sullivan.)

After defendant and Ragland began fistfighting, Sullivan hit Venerable in the eye, causing him to fall to the ground. (In his trial testimony, Venerable denied he fell down.) Venerable got up and, while still "dazed" from being hit, heard gunshots. When the detective asked Venerable whether Ragland "stole the first punch" and hit defendant first, Venerable said Ragland may have hit defendant first but he was uncertain about that. According to Venerable, defendant was "kinda like scared" of Ragland.

When asked whether he thought defendant and Sullivan knew why Venerable and Ragland were there, Venerable said someone must have "chirped" and told defendant that Venerable and Ragland were there because, when Venerable arrived at the Jacksons, "nobody was over there" in the alleyway. After Sullivan hit Venerable in the eye, Sullivan immediately walked over to defendant. Venerable did not see who shot Ragland but Venerable said "it had to be" defendant and Venerable was "a good ninety-eight percent" certain defendant was the shooter.

When asked whether Sullivan could have been the shooter, Venerable responded that when he heard the gunshots he was certain that Sullivan and defendant were "side by side," and Ragland was facing them, "still arguing." Defendant and Sullivan were standing only about 10 feet away from Venerable when the shots were fired, but Venerable was "still blurry" from being hit in the eye and did not see who had a gun or who pulled the trigger.

When the shots were fired, Ragland was standing between Venerable at one end and defendant and Sullivan at the other. Ragland did not have a weapon. Venerable did

not believe Sullivan was the shooter because Sullivan "wasn't . . . on that page with me" but "[n]ow [defendant] and them they was on the aggressive page. [¶] . . . [¶] . . . So that's why I figured . . . [defendant] . . . probably had the gun." When asked whether anyone else witnessed the crime, Venerable said, "[a] little ways up it was a gang of little boys," but they were "a good distance away." (In trial testimony, Venerable maintained he was around 39 feet behind defendant and Ragland when Ragland was shot, not 10 feet as he told the detective, and that several other people were standing in between Venerable, at one end, and defendant and Ragland, at the other.)

3. Charlene Hawkins's Testimony

In 2007, Hawkins and defendant were "[f]riends with benefits." Hawkins loaned defendant $200 to $300, but defendant never repaid her. When Ragland was at her house on the day he was shot, Hawkins told Ragland that defendant owed her money and was refusing to repay her. Ragland told her, "I'm going to go get your money," and she did not see him again.

When asked why she approached Ragland about collecting the debt, Hawkins responded, "[b]ecause he's a man and I'm a woman." When asked to explain, she said she "wasn't getting nowhere [*sic*]" with collecting the debt, so she went to Ragland "to see if maybe he could get somewhere with it." Hawkins first spoke with Ragland about the debt around two weeks before the shooting. She never told Venerable about the debt. After she received a telephone call telling her Ragland had been shot, Hawkins went to "Jackson Street," assuming Ragland had gone there because defendant hung out there.

When the police asked Hawkins after the shooting whether she knew Venerable, Hawkins lied and said she did not know her brother because she thought he might be in trouble.

When interviewed by the police on May 10, 2007, Hawkins said she went to Jackson Street on the morning of April 30, 2007, and saw defendant, Sullivan, and four other men "all hanging out together." Defendant looked directly at Hawkins, turned, and walked away. Shortly thereafter, Hawkins contacted Ragland.

4. Additional Prosecution Evidence

The parties stipulated that Ragland suffered a fatal gunshot wound to his lower left chest and died within minutes of being shot. No guns or shell casings were found at the scene of the shooting, and investigators were unable to determine the caliber of the bullet that caused Ragland's death. Sullivan's fingerprints were found on a Miller Genuine Draft beer can in the alley near the scene of the shooting.

A surveillance videotape from the liquor store, approximately 50 yards from the shooting, showed Ragland and Venerable in the store purchasing alcohol at 7:52 p.m. on April 30, 2007. A 911 call reporting "shots being fired" was made seven minutes later, at 7:59 p.m.

The surveillance videotape also showed defendant in the liquor store at 5:48 p.m. and 6:43 p.m. on April 30, 2007, but the tape did not show Sullivan in the liquor store at any time that day. The tape showed a man named Charles Graves in the liquor store at 5:37 p.m. Detective Jones testified that, "[a]ccording to witnesses," Graves was seen

"running away from the crime scene." At 5:48 p.m., the tape showed a man known as "Chicago" in the store purchasing a can of Miller Genuine Draft beer. The parties stipulated that Ragland had a blood-alcohol content of .14 percent, and had methamphetamine and marijuana in his system.

B. Defense Case

Neither defendant nor Sullivan testified or presented any other evidence.

III

DISCUSSION

A. Substantial Evidence Shows the Murder Was Deliberate and Premeditated

Defendant claims his first degree murder conviction must be reduced to second degree murder because insufficient evidence supports the jury's determination that the murder was deliberate and premediated. We conclude substantial evidence shows defendant shot and killed Ragland with deliberation and premeditation.

In determining whether sufficient evidence supports a criminal conviction, our standard of review is well settled. "'[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]'" (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) The same standard applies when the People rely primarily on circumstantial evidence to support a criminal conviction. (*Ibid.*) We "'must accept logical inferences that the jury might have drawn

from the evidence even if [we] would have concluded otherwise.'" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice is express or implied. Express malice exists when there is a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. (§ 188.)

There are two degrees of murder: first degree and second degree. "'Murder that is premeditated and deliberated is murder of the first degree.' [Citation.]" (*People v. Pearson* (2013) 56 Cal.4th 393, 443; § 189.) Malice is an element of murder of both the first and second degree, but malice is not synonymous with deliberation and premeditation, an element of first degree murder. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264, citing *People v. Bender* (1945) 27 Cal.3d 164, 181 ["'the mere intent to kill [i.e., express malice] is not the equivalent of a deliberate and premeditated intent to kill.'"].)

The People's sole theory in prosecuting defendant for the first degree murder of Ragland was that the murder was willful, deliberate, and premeditated. "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543; *People v. Boatman, supra,* 221 Cal.App.4th at p. 1264.) "The very definition of 'premeditation' encompasses the idea that a defendant thought about or

considered the act beforehand. ""[P]remeditation' means thought over in advance,"' and ""'[d]eliberation' refers to careful weighing of considerations in forming a course of action . . . ."' [Citation.]" (*People v. Pearson, supra,* 56 Cal.4th p. 443.)

"""The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"""" (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) By the same token, deliberation and premeditation requires "'*substantially more reflection* than . . . the mere formation of a specific intent to kill,'" that is, than the mere formation of express malice. (*People v. Boatman*, *supra*, 221 Cal.Ap.4th at pp. 1263-1264; *People v. Thomas* (1945) 25 Cal.2d 880, 900.)

"The use of circumstantial evidence in proving first degree murder was discussed in *People v. Anderson* (1968) 70 Cal.2d 15 . . . ." (*People v. Boatman*, *supra*, 221 Cal.App.4th at p. 1265.) The *Anderson* court stated: "Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation], or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill

as the result of a concurrence of deliberation and premeditation.'" (*People v. Anderson*, *supra*, at p. 25.)

"The *Anderson* court provided guidelines 'for the kind of evidence which is sufficient to sustain a finding of premeditation and deliberation.' ([*People v.*] *Anderson*, *supra*, 70 Cal.2d at p. 26.) Such evidence 'falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as "planning" activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).' (*Id.* at pp. 26–27.)" (*People v. Boatman*, *supra*, 221 Cal.App.4th at p. 1266.)

Our state Supreme Court has noted: "*Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In so doing, *Anderson*'s goal 'was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 . . . .) But, as we have often observed, '*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.'" (*People v. Solomon*, *supra*, 49 Cal.4th at p. 812.)

In any event, all three *Anderson* factors are present here—planning, motive, and manner of killing—and the entire record supports a reasonable inference that defendant shot and killed Ragland with deliberation and premeditation.

First, the jury could have reasonably inferred that defendant both planned to kill *and* had a motive to kill Ragland. Hawkins saw defendant on Jackson Street on the morning of April 30, 2007, hours before the shooting, and defendant ignored her. Only three days after the shooting, Venerable told Detective Jones that defendant and Sullivan appeared "angry" because Venerable and Ragland were in the alleyway confronting them about the $200 to $300 debt that defendant owed Hawkins, and defendant "was on the aggressive page" with Venerable and Ragland. As defendant walked with Ragland, Venerable overheard Ragland ask defendant how much money defendant had on him. Based on this evidence, the jury could have reasonably inferred that, when defendant and

Sullivan encountered Ragland and Venerable in the alleyway, defendant knew that Ragland and Venerable were there to confront him about the debt that he owed Hawkins.

Next, a fight suddenly broke out between defendant and Ragland. Then, Sullivan hit Venerable in the eye, causing Venerable to fall to the ground and "black out." Rather than continue to fight with Venerable, Sullivan immediately walked over to defendant, who was only around 10 feet ahead of Venerable, and Sullivan was standing "side by side" with defendant, facing Ragland, when Ragland was shot. As the People argue, defendant and Sullivan "appeared to have a plan," and the jury could have reasonably inferred that defendant's killing of Ragland "was . . . an ambush."

Additionally, defendant was not known to carry a gun and Venerable did not see that defendant had a gun, but Venerable told Detective Jones he was "ninety-eight percent" certain defendant was the person who shot Ragland. The jury could have reasonably accepted that defendant must have shot Ragland, because Venerable told the detective he was only 10 feet away from defendant, Sullivan, and Ragland when Ragland was shot. No one else was nearby, and Venerable did not believe Sullivan was the shooter because Sullivan "wasn't . . . on [the aggressive] page" with Ragland and Venerable, while defendant was angry and aggressive as soon as Ragland and Venerable showed up.

All of this evidence shows defendant had a *motive* to kill Ragland, namely, his anger that Ragland was confronting him about the debt he owed Hawkins. The jury also could have reasonably inferred that defendant *planned* to kill Ragland—specifically, that

defendant thought about killing Ragland before he shot him and carefully weighed the considerations for and against shooting and killing Ragland. Defendant had several minutes to consider shooting and killing Ragland after Ragland and Venerable appeared in the alleyway and Ragland began confronting defendant about the debt. Finally, the *manner of the killing*—Ragland was shot at close range in the chest, a vital area of his body—shows defendant contemplated killing Ragland rather than disabling him.

Defendant emphasizes Venerable did not see defendant with a gun and did not see who shot Ragland, and maintains there was no evidence the shooting was planned. He argues, "[a]t worst, the shooter quickly formed the intent to kill during the heat of the fight" and the remainder of the circumstantial evidence "contradicts a cool and calculated killing." Though we agree that the jury reasonably could have interpreted the evidence as defendant urges, and found defendant guilty of only second degree murder rather than first degree premeditated murder, it did not do so, and substantial evidence supports its determination that the murder was deliberate and premeditated.

B. Insufficient Evidence Supported Instructions on Voluntary Manslaughter Based on Unreasonable or Imperfect Self-defense

Defendant next claims the trial court erroneously failed to instruct sua sponte on the lesser included offense of voluntary manslaughter based on imperfect self-defense.[2] The trial court has a duty to instruct sua sponte on all lesser included offenses, but only if

[2] The jury was instructed on voluntary manslaughter based on a sudden quarrel or heat of passion.

substantial evidence shows the defendant committed the lesser and not the greater offense. (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) We independently review whether a trial court has erroneously failed to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

Voluntary manslaughter is a lesser included offense of murder, and one theory of voluntary manslaughter is a killing arising from unreasonable or imperfect self-defense. (*People v. Barton* (1995) 12 Cal.4th 186, 199-201.) Substantial evidence supports instructing on voluntary manslaughter based on imperfect self-defense "whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Id*. at p. 201.)

As our state Supreme Court has more recently observed: "A killing committed because of an unreasonable belief in the need for self-defense is voluntary manslaughter, not murder. 'Unreasonable self-defense, also called imperfect self-defense "obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." [Citations.]'" (*People v. Elmore* (2014) 59 Cal.4th 121, 129-130.)

Imperfect self-defense is a form of mistake of fact. (*People v. Elmore*, *supra*, 59 Cal.4th at p. 130.) It is the "actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178; *People v. Elmore*, *supra*, at p. 134.) "'[T]he doctrine is narrow. . . . The defendant's fear must be of *imminent* danger to life or great bodily

injury. "'[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.' . . .'"" (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

Defendant points to the evidence that Ragland started and was winning the fistfight with defendant and that Ragland had methamphetamine in his system as sufficient to support instructing on voluntary manslaughter based on imperfect self-defense. We disagree. There was no evidence that defendant actually, if unreasonably, believed he had to shoot and kill Ragland to defend his own life or to prevent Ragland from inflicting great bodily injury on him. There was no evidence that Ragland was armed with any weapons, or that defendant was in imminent peril of being killed by Ragland or of suffering great bodily injury at the hands of Ragland.

Venerable testified that a "tussle" broke out between defendant and Ragland, and Venerable initially told Detective Jones that Ragland may have thrown the first punch, but the evidence also showed defendant shot and killed Ragland only moments after his fight with Ragland broke out. Defendant's defense was that he was not the shooter. He did not claim, and insufficient evidence shows, that he shot and killed Ragland because he actually believed Ragland was about to kill him or inflict great bodily injury on him. Thus, even if Ragland started and was winning the fight and had methamphetamine in his system, or appeared unwilling to back down from the fight, and even if defendant was "kinda like scared" of Ragland as Venerable indicated, insufficient evidence supported instructing on voluntary manslaughter based on imperfect self-defense.

People v. Vasquez, *supra*, 136 Cal.App.4th 1176, upon which defendant relies, does not assist him. The defendant in *Vasquez* was convicted of second degree murder, and the appellate court held there was sufficient evidence to instruct on voluntary manslaughter based on imperfect self-defense because the defendant, who was confined to a wheelchair, pulled out a gun and shot the victim as the victim was choking the defendant in an alleyway. (*Id.* at pp. 1178-1181.) Here, by contrast, Ragland was not choking defendant or otherwise threatening defendant with great bodily injury or death, and defendant was not physically unable to escape from Ragland.

C. The New Trial Motion Based on Newly Discovered Evidence Was Properly Denied, and the Court Was Not Required to Hear Live Testimony from Defendant's Witnesses

Defendant moved for a new trial based, among other grounds, on newly discovered evidence (§ 1181, cl. 8), namely, the declarations of four witnesses, including Sullivan, who came forward after trial claiming defendant was not present at the time of the shooting and was not the shooter. The court denied the motion on the grounds the declarations were "wholly inadequate" or factually insufficient to show a different result was probable in the event the case was retried.

The court also refused defense counsel's offer to hear live testimony from any of the declarants, three of whom were present at the hearing on the new trial motion and were willing to testify. Defendant claims the matter must be remanded to the trial court with directions to hold a new hearing on the new trial motion for the purpose of hearing live testimony from the declarants. We find no abuse of discretion, either in the trial

court's refusal to hear live testimony from any of the declarants, or in its denial of the new trial motion.

1. Background

Defendant submitted the declarations of Albert Ramirez, Erik Hollis, Maurice Anderson, and Sullivan, each of whom claimed they were present at the time of the shooting and that defendant did not shoot Ragland.

In his declaration, Ramirez stated he witnessed "an altercation that Norris Ragland had at 200 E. Jackson St." on April 30, 2007; at no point in time during the altercation did he see defendant "on 200 E. Jackson St."; defendant did not shoot Ragland; and Ramirez was unaware that defendant was prosecuted for shooting Ragland until he read "a newspaper article after" defendant's trial. In their declarations, Hollis and Anderson stated they saw Ragland get shot; defendant was not the shooter; they did not see defendant on April 30, 2007 when they were at 200 East Jackson Street; and they learned defendant was prosecuted for the crime after they read a newspaper article after defendant's trial.

The record does not include Sullivan's declaration, but defense counsel represented at the hearing on the motion that Sullivan signed a declaration stating he witnessed the shooting and defendant was not present during the shooting.[3] It appears

[3] Regarding Sullivan's missing declaration, defendant states in his opening brief that he submitted a letter to the superior court to correct the record to include Sullivan's declaration pursuant to California Rules of Court, rule 8.340(b), and that on September 18, 2015, the clerk signed an affidavit stating that Sullivan's declaration could not be located following a diligent search of the court file. It appears defendant did not submit

[footnote continued on next page]

the trial court and the prosecutor reviewed Sullivan's declaration, along with the declarations of Ramirez, Hollis, and Anderson. At the hearing on the motion, Sullivan, Hollis, and Ramirez, but apparently not Anderson, were present and willing to testify.

The People opposed the motion on the ground the declarations were not credible and the evidence was not newly discovered. The People pointed out that, before trial, the defense planned to call two other "alibi" witnesses, namely, defendant's girlfriend Marquisha Smith and her brother Michael Smith, each of whom would testify defendant was not in the alleyway at the time of the shooting. The defense did not call those witnesses after the prosecutor showed defense counsel that their criminal histories contained impeachment evidence. Given that the defense could have called the Smiths to testify that defendant was not present during the shooting, the People argued that the similar proffered testimony from Sullivan, Ramirez, Hollis, and Anderson was not newly discovered. (§ 1181, cl. 8.)

Additionally, the People argued none of the four "new" witnesses were credible because none of them identified the shooter, though they all claimed they were present at the time of the shooting and that defendant was not the shooter. And like the Smiths, the four "new" witnesses had criminal histories that would undermine their credibility. The defense countered it was unaware Ramirez, Hollis, and Anderson had witnessed the

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Sullivan's declaration until he filed his amended motion for new trial on April 17, 2015, the date of the hearing on the motion.

shooting until they came forward after trial, and the defense was unable to interview Sullivan until after the People's right to appeal his section 1118.1 dismissal had expired.

As indicated, the trial court denied the motion on the ground the four declarations were "wholly inaccurate to even have a hearing to call them to the stand, let alone grant a new trial." The court explained that the information in the declarations was insufficient to question the verdict or to show that a new trial, with any of the witnesses testifying, would result in a different verdict. The court emphasized it was not denying the motion on the ground the witnesses were not credible or because their testimony was not newly discovered.

2. Analysis

Defendant claims the court abused its discretion in refusing to hear any testimony from the three declarants who were present at the hearing. He argues that a court's refusal to hear live testimony from a newly discovered witness on a motion for new trial is governed by *People v. Hairgrove* (1971) 18 Cal.App.3d 606, which "dictates that such a refusal—when the new evidence is *potentially* critical—is an abuse of the trial court's discretion." For the reasons we explain, we disagree.

First, section 1181, clause 8 authorizes the trial court to grant a defendant a new trial based on newly discovered evidence.[4] (*People v. Ault* (2004) 33 Cal.4th 1250,

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[4] Section 1181, clause 8 states that a court may, upon the application of a defendant against whom a verdict has been rendered or a finding has been made, grant the defendant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered

[footnote continued on next page]

1260.) "'To entitle a party to a new trial on the ground of newly discovered evidence, it must appear,—"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." [Citation.]'" (*People v. Soojian* (2010) 190 Cal.App.4th 491, 512.) "'"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."' [Citations.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

The court did not abuse its discretion in refusing to hear live testimony from the three present declarants before denying the motion for new trial. As the People point out, section 1181, clause 8 expressly contemplates that a motion for a new trial based on newly discovered evidence will be supported by affidavits, not live testimony. The statute states, in pertinent part: "When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support

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evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable."

thereof, the affidavits of the witnesses by whom such evidence is expected to be given . . . ."

Hairgrove is not controlling and did not require the trial court to hear live testimony from the declarants. After the defendant Hairgrove was convicted of burgling a car, he moved for a new trial based on newly discovered evidence, namely, the declaration of Larry Spasbo who claimed he burgled the car and Hairgrove neither accompanied him nor knew anything about the burglary. (*People v. Hairgrove*, *supra*, 18 Cal.App.3d at pp. 608-609.) Hairgrove's attorney also declared he had no knowledge of Spasbo's willingness to confess until after the defendant's trial was completed. (*Id*. at p. 609.) At the hearing on the new trial motion, Spasbo was present and willing to testify, but the court "effectively dissuaded" him from testifying because he would incriminate himself. (*Ibid*.) The prosecution then offered to call a police officer to testify that, before trial, Hairgrove told the officer that Spasbo would "cop out," meaning Spasbo would confess to the burglary, but on two occasions when the officer asked Spasbo about defendant's statement, Spasbo said he had nothing to do with the crime. (*Id*. at p. 610.)

The *Hairgrove* court noted the new trial motion was apparently denied because the defendant Hairgrove had not shown reasonable diligence in attempting to produce Spasbo to testify at trial, knowing he might confess, but then noted there was "nothing to indicate that Spasbo, prior to Hairgrove's trial, had been willing to admit to the crime. On the contrary Spasbo twice told a police officer he had nothing to do with it. We do not see how greater diligence before trial by defendant or his counsel would have altered matters

to defendant's advantage, and accordingly we do not believe a denial of the motion on the ground of lack of diligence was proper." (*People v. Hairgrove*, *supra*, 18 Cal.App.3d at p. 610.)

The *Hairgrove* court then stated it was expressing no opinion on the merits of the motion, but vacated the judgment and directed the trial court to hear live testimony from Spasbo on remand, explaining: "[T]he situation which confronted the trial court at the hearing was that Hairgrove stood convicted for a crime to which Spasbo now confessed and Spasbo was present in court and willing to testify. Under these circumstances the trial court should have taken affirmative action to call Spasbo as a witness and examine him under oath. Had the court done so Spasbo's testimony might have established (a) that there was substantial merit to Hairgrove's motion, or (b) that Spasbo had perjured himself to help out a friend. Either outcome would have contributed positively to the administration of justice. Even if Spasbo's testimony had turned out to be in[con]clusive, at least the court would have had all available information before it in ruling on the motion for a new trial." (*People v. Hairgrove*, *supra*, 118 Cal.App.3d at pp. 610-611.) In effect, *Hairgrove* directed the trial court to take testimony from Spasbo in order to determine whether his confession was credible and thus whether a different result was probable on retrial. (*Id*. at p. 610.)

This case is completely unlike *Hairgrove,* where live testimony from Spasbo would have helped the trial court determine whether his confession was credible or he was perjuring himself to help his friend Hairgrove. (*People v. Hairgrove*, *supra*, 18

Cal.App.3d at pp. 609-610.) Here, none of the four declarants confessed to shooting Ragland, and it was unnecessary for the trial court to hear live testimony from any of the declarants in order to determine whether they were fabricating a confession.

Defendant argues *Hairgrove* "dictates" that a trial court abuses its discretion if it refuses to hear live testimony from a declarant on a new trial motion, "when the new evidence [or testimony] is *potentially* critical." But *Hairgrove* holds only that it is an abuse of discretion to refuse to hear live testimony from a *confessing* declarant, when such live testimony is critical to determining whether the declarant's confession is credible or fabricated, and hence whether a different result is probable on remand.

Hairgrove does not require courts to hear live testimony from just any declarant, simply to allow the declarant to adduce information the declarant did not include in his or her declaration in the first instance, no matter how "critical" that information may be. Section 1181, clause 8 contemplates that all such "critical" information should be included in the supporting declaration in the first instance. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1004 ["The motion for new trial, including the issue of a probable different outcome on retrial, must, of course, be decided on the evidence actually before the court at that time, not on the basis of evidence that might be developed."].)

The trial court did not abuse its discretion in denying the new trial motion based solely on the content of the four declarations, without hearing additional, live testimony from the declarants. "'To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial.' [Citation.]" (*People v.*

Verdugo (2010) 50 Cal.4th 263, 308.) In their declarations, the declarants offered only vague and conclusory statements that they witnessed the shooting, or the fight in which Ragland was involved, and that defendant was not the shooter. None of the declarants explained their relationship, if any, to defendant; where they were at the time of the shooting; the identity of the shooter; or what the shooter looked like.

As the trial court ruled, the declarants' bare, conclusory statements that defendant was not present during the shooting and was not the shooter were "wholly inadequate" to make a different result probable on retrial. (*People v. Beeler*, *supra*, 9 Cal.4th at pp. 1004-1005 [counsel's "extremely vague and equivocal declaration . . . was so tenuous that it clearly did not make a different outcome probable, or even remotely likely."].) The declarants' unsupported assertions that defendant was not the shooter would not give a jury any reason to question Venerable's statements to Detective Jones, made only three days after the shooting, that he was only 10 feet away from defendant, Sullivan, and Ragland when Ragland was shot; that no one else was in the area; and, though he did not see defendant shoot Ragland, he was "ninety-eight percent" certain defendant was the person who shot Ragland.

D. Defendant's Ineffective Assistance of Counsel Claim Lacks Merit

Finally, defendant claims his trial counsel violated his Sixth Amendment right to effective assistance of counsel in failing to object when the prosecutor, during his rebuttal closing argument, "falsely and repeatedly accuse[d] defense counsel of deceiving the jury," and suggested defendant was a person of bad character.

In particular, defendant claims the prosecutor committed misconduct in that he "fatally undermined defense counsel's credibility in three improper ways: (1) after falsely accusing defense counsel of addressing [defendant's] character, the prosecutor insinuated that [defendant] was a 'bad person;' (2) he falsely accused defense counsel of misstating the facts; and (3) he falsely accused defense counsel of misstating a crucial rule of law related to circumstantial evidence." We find no prosecutorial error in any of these respects. Accordingly, we conclude defense counsel did not render prejudicial ineffective assistance in failing to object to the prosecutor's remarks.

1. Applicable Law

A criminal defendant has a Sixth Amendment federal constitutional right to effective assistance of counsel. (*United States v. Cronic* (1984) 466 U.S. 648, 653-654; *People v. Pope* (1979) 23 Cal.3d 412, 423-424.) "A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

The defendant bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice, that is, it is reasonably probable the jury would have reached a more favorable verdict in the absence of the error. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Centeno* (2014) 60 Cal.4th 659, 674.)

In reviewing an ineffective assistance claim, we "give great deference to counsel's tactical decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) If the record does not contain an explanation for the challenged act or omission, we must reject a claim of ineffective assistance unless counsel failed to provide an explanation when asked or there could be no satisfactory explanation for counsel's conduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) A trial counsel's decision whether to object is "inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.) The "failure to object seldom establishes counsel's incompetence." (*People v. Maury* (2003) 30 Cal.4th 342, 415-416.)

"A prosecutor is not permitted to make false or unsubstantiated accusations that [defense] counsel is fabricating a defense or deceiving the jury." (*People v. Clark* (2011) 52 Cal.4th 856, 961.) "When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]'" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.)

2. Analysis

Defendant claims there was no conceivable reason for his trial counsel's failure to object to the prosecutor's rebuttal closing argument remarks described below. He claims

that, "[b]y allowing the prosecutor to make false and unsupported attacks on defense counsel's integrity and suggest to the jury that [defendant] had bad character—all during rebuttal closing argument—defense counsel provided unreasonably poor representation."

As we explain, we disagree that defense counsel rendered prejudicial ineffective assistance in failing to object to any of the prosecutor's rebuttal remarks. In context, it is not reasonably likely the jury misconstrued any of the remarks in an improper manner—that is, as impugning defense counsel's integrity or defendant's character.

(a) *The References to Defendant's Character*

Defendant first argues "the prosecutor falsely accused defense counsel of arguing the character of [defendant]." He bases this argument on the point in the rebuttal closing argument where the prosecutor said: "Bad person—he [defense counsel] goes over there, he puts his hand on his client's shoulder—you have no evidence my client is a bad person. [¶] Guess what? It's illegal for me to bring up the character of the defendant in a trial. I am not allowed to. So when he [defense counsel] says I didn't bring up any evidence of his bad character, that he's a bad person; it's because I followed the law. That is my job, to follow the law. It's highly improper for the defense to try to use that, the fact that I followed the law and I did not overstep my bounds by trying to prove he's a bad person when I am not allowed to. Okay, I am not going to; it is not my job."

Defendant claims his counsel did not make "*any* reference to [defendant]'s character—good or bad" and the prosecutor "invented a statement that did not exist, thereby creating a 'straw man' to attack." Defendant claims it was a prejudicially

deficient performance for his counsel not to object, given that the prosecutor "falsely accused defense counsel of improper tactics *and* suggested there might be evidence to prove [defendant's] bad character."

The People respond that defense counsel's failure to object to this argument was reasonable "as it appears from the record that defense counsel attempted to vouch for [defendant] by laying his hands on him during argument. The prosecutor in rebuttal properly called counsel out on his tactic." We agree. While discussing Hawkins's testimony during his closing argument, defense counsel apparently put his hand on defendant's shoulder when he argued: "Is that [referring to Hawkins] somebody you can trust to call this man a murderer? When you don't know, nothing has been introduced to show that [defendant] is a bad person?"

The prosecutor's rebuttal to defense counsel's argument was appropriate, and it is not reasonably likely the jury misunderstood the rebuttal as impugning defense counsel's integrity or as suggesting that defendant had a bad character. To the contrary, the prosecutor appropriately pointed out that it was not his job, and the law did not allow him, to present bad character evidence. It was reasonable for defense counsel not to object to the rebuttal argument. Objecting only would have highlighted that the prosecutor appropriately did not introduce any bad character evidence.

(b) *"Misrepresenting the Facts"*

Next, defendant argues "the prosecutor incorrectly charged defense counsel with misrepresenting the facts" concerning Venerable's explanation of why he went to the

Jacksons on April 30, 2007. In his closing argument, defense counsel pointed out that Venerable "told us in the interview that he went [to the Jacksons] to pick up Mr. Ragland. And [Ragland] was already there, because [Venerable] received a call that [Ragland] was there and [Venerable] *didn't want* [*Ragland*] *to be over there by himself*." (Italics added.)

In rebuttal, the prosecutor pointed out that the interview transcript showed Venerable did not say he went to the Jacksons because he did not want Ragland to be there "by himself." Instead, the prosecutor argued the transcript showed Venerable "is not there to back [Ragland] up, he is there to go get [Ragland] and take him out of that area." The rebuttal was appropriate, and did not "incorrectly charge[] defense counsel with misrepresenting the facts." The prosecutor reasonably interpreted defense counsel's remark as suggesting Venerable said he went to the Jacksons to "back up" Ragland, rather than to get Ragland out of the Jacksons, as Venerable in fact said during the interview. It was reasonable for defense counsel not to object to the rebuttal, because the prosecutor properly pointed out what Venerable actually said. And in making his point, the prosecutor said nothing that the jury might have interpreted as impugning defense counsel's integrity.

(c) *Misstating the Law on Circumstantial Evidence*

Defendant next argues the prosecutor improperly accused defense counsel of misstating the law on circumstantial evidence and of calling certain direct evidence circumstantial evidence. We find no prosecutorial error here, either.

During his closing argument, defense counsel read to the jury the instructions on circumstantial evidence (CALCRIM No. 225), then argued: "So [the prosecutor] tells you the reason circumstantial evidence proves that [defendant] shot Mr. Ragland was because, I guess, Mr. Brian Venerable, I guess, saw six or seven people around him; and therefore, [defendant] could have shot him so—guess what?—he's guilty. [¶] However, that's contrary to the law. That law I just read to you indicates, if in fact you have two or more reasonable conclusions as it relates to circumstantial evidence—what is circumstantial evidence in this case? Six or seven other guys around could they have been the shooter? Sure, they could have been. . . . You must—not may, but you must—find him not guilty if there's two reasonable conclusions of circumstantial evidence."

The prosecutor rebutted by saying: "Remember when I said that the defense is going to try to pull those facts out that favor the defense. Six or seven others in that alley, any one of them could shoot; okay? He tried to use that as a reasonable use of circumstantial evidence, that there's another possibility; okay. [¶] *That's direct evidence*; okay? [¶] He said on the stand there's six or seven. Do you believe it? That's the question; okay? [¶] Misstatements of the law." (Italics added.) The prosecutor then asked the jury whether it believed Venerable's testimony that he was over 30 feet away from defendant when the shooting occurred and there were six or seven people in between himself and defendant, or whether it believed Venerable's earlier statement to Detective Jones that Venerable was only 10 feet away from the shooting, and "the only

other people in the alley were farther away. [¶] Direct evidence. Do you believe it? Not two rational explanations of it; that's circumstantial."

Defendant argues the prosecutor was "clearly wrong" in calling the evidence that there were six or seven other people between Venerable and defendant "direct" rather than circumstantial evidence, because the jury could have reasonably inferred that one of those six or seven other people shot defendant. This argument misunderstands the prosecutor's rebuttal point. The prosecutor properly urged the jury to disbelieve Venerable's trial testimony—the direct evidence—that six or seven other people were in the alleyway, and to credit Venerable's earlier statement that no one other than defendant, Sullivan, and Ragland were nearby when the shooting occurred. There was only "a gang of little boys" farther up the alleyway.

The rebuttal argument was proper. As the prosecutor argued, Venerable's testimony that six or seven other people were in the alleyway was direct evidence—though defense counsel correctly pointed out that this direct evidence supported a circumstantial inference that one of those other people shot Ragland. (See CALCRIM No. 223 ["[d]irect evidence can prove a fact by itself"; circumstantial evidence indirectly proves a fact].)

As the prosecutor further argued, defense counsel misstated the law of circumstantial evidence when he told the jury it had to accept the circumstantial inference that defendant was not the shooter *because six or seven other people could have shot Ragland*. (CALCRIM No. 225 [when circumstantial evidence supports two reasonable

inferences—one that the defendant had the requisite criminal intent and one that he did not—the jury must accept the inference that points to the defendant's innocence].)

The key question the jury had to determine, as the prosecutor pointed out, was whether six or seven other people were present at the time of the shooting or whether they were not. In invoking CALCRIM No. 225 as requiring the jury to find defendant not guilty because six or seven other people might have shot Ragland, defense counsel was ignoring Venerable's earlier statement to the detective that no one other than defendant and Sullivan were nearby when the shooting occurred, and that defendant, therefore, must have been the person who shot Ragland. Contrary to defense counsel's suggestion, it was not a matter of one piece of evidence supporting two reasonable inferences. It was a matter of determining whether one of Venerable's two versions of events was true, and what to conclude from that.

(d) *Misleading the Jury*

Lastly, defendant argues "[t]he most egregious part of the prosecutor's misconduct arose from falsely characterizing defense counsel as someone trying to mislead the jury." The prosecutor at one point said: "Misstatements of the transcripts; misstatements of the facts; misstating the law, switching people; the English language is our tool and our weapon. Keep this in mind when you start considering what was said to you in [defense counsel's] closing argument."

As defendant notes, "accusations that counsel fabricated a defense or misstated facts in order to deceive the jury, are forbidden." (*People v. Tate* (2010) 49 Cal.4th 635,

692-693.) But this is not what occurred here. Closing arguments were spirited on both sides, and this is not surprising given the inconsistencies between Venerable's trial testimony and his prior statements to the detective. But the prosecutor did not impugn defense counsel's integrity or suggest defendant had bad character. It follows that defense counsel did not render ineffective assistance in failing to object to the prosecutor's complained-of rebuttal remarks. The remarks were proper.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.